

**United States Department of Labor
Employees' Compensation Appeals Board**

C.B., Appellant

and

**TENNESSEE VALLEY AUTHORITY,
NUCLEAR SECURITY, Chattanooga, TN,
Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 13-43
Issued: May 7, 2013**

Appearances:

*Robert Jeffrey Wolford, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 5, 2012 appellant, through her attorney, filed a timely appeal from May 30 and September 24, 2012 decisions of the Office of Workers' Compensation Programs (OWCP) denying her claims for disability compensation. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant met her burden of proof to establish that her disability for the periods October 25 through December 30, 2011 and January 3 through 13, 2012 was causally related to her July 28, 2011 employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the September 24, 2012 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

OWCP accepted that appellant, then a 46-year-old security sergeant, sustained left lateral epicondylitis and left shoulder and upper arm sprain in the performance of duty on July 28, 2011. She grabbed a sink to avoid falling in a bathroom. OWCP paid appellant disability compensation for the period January 26 through May 5, 2012.

Appellant, through her attorney, filed claims for disability (Form CA-7s) for the periods October 25 through December 30, 2011 and January 3 through 13, 2012. She also submitted a prescription profile and time analysis forms indicating that she was unable to work due to pain and medication.

On July 28, 2011 Dr. Linda M. Pate, a Board-certified surgeon, advised that appellant had limited ability to reach above the left shoulder.

In a November 23, 2011 report, Dr. W. Michael Tew, an orthopedic surgeon, diagnosed cervical strain with paraspinal muscle spasm with tenderness and a partial tear to the extensor carpi radialis brevis of the left elbow. He listed a history that appellant reached out to grab a sink to prevent a fall at work on July 28, 2011 and developed pain in her left shoulder and elbow regions. Dr. Tew reported that appellant was released to limited duty and was doing dispatch work.

By letters dated January 10 and 17, 2012, OWCP notified appellant of the deficiencies of her claim. It afforded her 30 days to submit additional medical evidence to support total disability for the periods October 25 through December 30, 2011 and January 3 through 13, 2012.

Appellant subsequently submitted a January 20, 2012 report from Dr. Tew, who indicated that she tried to perform light duty at work; but as of December 7, 2011 she had to go home and was unable to return to work. Dr. Tew reported that appellant had not been out of her house more than three times in the prior month and a half.

In a March 28, 2012 report, Dr. Steven Musick, a Board-certified physiatrist, opined that appellant's left elbow symptoms and left scapulothoracic pain were causally related to the employment injury. He did not recommend resuming work activities until she started Cymbalta medication. Dr. Musick noted that she might need prescriptions for anti-inflammatory medications. Once resuming work activities, he recommended a six-hour workday for the first week or two weeks before advancing to an eight-hour shift with the following restrictions: no pushing, pulling or lifting over one to two pounds with left upper extremity; no work over shoulder height; ability to change positions frequently.

By decision dated April 18, 2012, OWCP denied appellant's claim for compensation for the period October 25 through December 30, 2011. It found that the medical evidence failed to establish that she was disabled for work due to the employment injury.³

³ OWCP paid appellant four hours of compensation for attending a medical appointment on November 23, 2011.

On April 24, 2012 appellant, through her attorney, requested reconsideration and submitted a statement from her attorney dated April 26, 2012. In a May 2, 2012 report, Dr. Musick stated that he wanted to release appellant to return to work for six hours a day; but as such work was not offered by the employing establishment, he had no option but to start her full time with restrictions and to reevaluate her in four weeks.

By decision dated May 30, 2012, OWCP denied appellant's claim for compensation for the period January 3 through 13, 2012 on the basis that the medical evidence failed to establish that she was disabled for work due to the employment injury.

On May 31, 2012 Dr. Musick indicated that appellant had pain in the left posterior shoulder and left upper extremity due to her employment injury. He advised her to stay on the same work restrictions and see him again in a month.

By decision dated June 27, 2012, OWCP denied modification of the April 18, 2012 decision on the basis that the medical evidence was insufficient to establish that appellant was disabled during the period claimed.

On September 6, 2012 appellant, through her attorney, requested reconsideration. In an August 10, 2012 report, Dr. David N. Bowers, a Board-certified physiatrist, conducted an electromyogram (EMG) and nerve conduction studies (NCS). He found a normal EMG/NCS of the left upper extremity and cervical paraspinals. Dr. Bowers noted an incidental finding of positive bilateral Hoffman's sign and indicated that the study revealed no electrical evidence of left cervical radiculopathy, thoracic outlet nerve compression, brachial plexopathy, median or ulnar neuropathy, peripheral polyneuropathy or other lower motor neuron disease.

In an August 14, 2012 report, Dr. Musick found that appellant had reached maximum medical improvement. Upon review of appellant's position description, he opined that she was not able to return to her work as security sergeant. Dr. Musick recommended the following work restrictions: limited reaching above the left shoulder; only occasional reaching with the left upper extremity; not able to operate motor vehicle at work; limited pushing, pulling or lifting with left upper extremity to five pounds occasionally; no climbing.

By decision dated September 24, 2012, OWCP denied modification of the June 27, 2012 decision. It found that the medical evidence failed to establish that appellant was disabled due to the employment injury for the period claimed.

LEGAL PRECEDENT

Section 8102(a) of FECA⁴ sets forth the basis upon which an employee is eligible for compensation benefits. That section provides: "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty...." In general the term "disability" under FECA means "incapacity, because of an employment injury, to earn the wages the employee was

⁴ 5 U.S.C. § 8102(a).

receiving at the time of injury.”⁵ This meaning, for brevity, is expressed as disability for work.⁶ For each period of disability claimed, the employee has the burden of proving that he or she was disabled for work as a result of the accepted employment injury.⁷ Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable probative and substantial medical evidence.⁸

Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used under FECA and is not entitled to compensation for loss of wage-earning capacity. The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁹

ANALYSIS

The Board finds appellant has not established that she was disabled for the periods October 25 through December 30, 2011 and January 3 through 13, 2012 causally related to her employment injury. While OWCP accepted that she sustained an employment injury, appellant bears the burden to establish through medical evidence that she was disabled during the claimed time periods and that her disability was causally related to her accepted injury.¹⁰ The Board finds that appellant did not submit rationalized medical opinion evidence explaining how the employment injury caused her to be disabled for work for the periods October 25 through December 30, 2011 and January 3 through 13, 2012.

Dr. Tew diagnosed cervical strain with paraspinal muscle spasm and tenderness and partial tear extensor carpi radialis brevis left elbow. He reported that appellant was released to limited duty and was doing dispatch work. On January 20, 2012 Dr. Tew indicated that appellant tried to continue light duty at work but, as of December 7, 2011, she went home and was unable to return to work. He reported that she had not been out of her house more than three times in the prior month and a half. The Board has held that when a physician’s statement regarding an employee’s ability to work consists only of a repetition of the employee’s complaints that she hurts too much to work without objective signs of disability being shown, the

⁵ 20 C.F.R. § 10.5(f). See also *William H. Kong*, 53 ECAB 394 (2002); *Donald Johnson*, 44 ECAB 540, 548 (1993); *John W. Normand*, 39 ECAB 1378 (1988); *Gene Collins*, 35 ECAB 544 (1984).

⁶ See *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

⁷ See *William A. Archer*, 55 ECAB 674 (2004).

⁸ See *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

⁹ *Id.*

¹⁰ See *supra* notes 7 and 8. See also *V.P.*, Docket No. 09-337 (issued August 4, 2009).

physician has not presented a probative medical opinion on the issue of disability.¹¹ Although Dr. Tew provided a firm diagnosis and opined that appellant was disabled, he failed to provide a rationalized medical explanation as to how appellant's employment-related residuals caused her total disability or prevented her from continuing in her employment at modified duty. The Board finds that Dr. Tew's reports are not sufficient to establish appellant's disability for the periods claimed.

Dr. Musick opined that appellant's left elbow symptoms and left scapulothoracic pain were causally related to the employment injury. On May 2, 2012 he stated that he wanted to release her to return to work for six hours a day, but such work was not available; therefore, he started her at full time with restrictions. Dr. Musick indicated on May 31, 2012 that appellant had continued pain in the left posterior shoulder and left upper extremity due to her employment injury. He advised her to stay on the same work restrictions and see him in about a month. On August 14, 2012 Dr. Musick opined that appellant had reached maximum medical improvement. While appellant was not able to return to her position as security sergeant, he advised that she could work at modified duty with restrictions: limited reaching above the left shoulder; only occasional reaching with the left upper extremity; not able to operate motor vehicle at work; limited pushing, pulling or lifting with left upper extremity to five pounds occasionally; no climbing. The Board finds that Dr. Musick failed to support that her employment-related residuals prevented her from continuing in her federal employment within the specified work restrictions. Therefore, appellant has not met her burden of proof to establish that she was disabled for work due to the employment injury for the periods claimed.

On July 28, 2011 Dr. Pate indicated that appellant had limited ability to reach above the left shoulder. On August 10, 2012 Dr. Bowers found a normal EMG/NCS of the left upper extremity and cervical paraspinals. As Drs. Pate and Bowers failed to offer any probative medical opinion on whether appellant was disabled on the dates at issue due to her accepted conditions, their reports are of diminished probative value.¹²

Appellant has not submitted any rationalized medical evidence establishing that she was disabled for the periods October 25 through December 30, 2011 and January 3 through 13, 2012 causally related to the employment injury. Thus, she has not met her burden of proof to establish that she is entitled to compensation for any disability.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that her disability for the periods October 25 through December 30, 2011 and January 3 through 13, 2012 was causally related to her employment injury.

¹¹ See William A. Archer, *supra* note 7.

¹² See Sandra D. Pruitt, 57 ECAB 126 (2005). See also V.P., *supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the September 24 and May 30, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 7, 2013
Washington, DC

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board